90-1193

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

PAUL DEE HUMAN, Superintendent of Gravette Public School District; A.P. VOHS, Principal of Gravette Elementary School; DALE BEQUETTE, President of the Gravette School Board; and JOHN GARRETT, REX ELDER, JERRY EASLEY, CHARLES L. CASEY, BILLY V. HALL, and BILL MEADE, Members of the Gravette School Board; and Their Agents, Employees, and Successors in Office; and THE GRAVETTE PUBLIC SCHOOL DISTRICT, Petitioners,

v.

JOHN DOE and MARY DOE, Individually and as Next Friends of the Minor, CHRIS DOE, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Counsel of Record
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QUESTIONS PRESENTED

1. Whether a nonsponsored, nonfunded, nondenominational course of Bible instruction conducted on public school premises by outside persons and available to students on a voluntary basis with written parental permission, violates the Establishment Clause of the First Amendment to the United States Constitution.

2. Whether an Injunction prohibiting the School Board from permitting the above course of Bible instruction or any similar course of instruction on school premises during school hours is overly broad, overly vague, and/or violative of the free speech and free exercise of religion rights of Petitioners and the students, parents, and citizens they represent.

3. Whether genuine issues of material fact exist that render summary judgment inappropriate.

LIST OF PARTIES

The parties are as follows:

The Petitioners are the Defendants in the District Court action and the Appellants in the United States Court of Appeals for the Eighth Circuit action, PAUL DEE HUMAN, Superintended of Gravette Public School District; A.P. VOHS, Principal of Gravette Elementary School; DALE BEQUETTE, President of the Gravette School Board; and JOHN GARRETT, REX ELDER, JEERRY EASLEY, CHARLES L. CASEY, BILLY V. HALL, and BILL Meade, MNembers of the Gravette School Board; and Their Agents, Employees, and Successors in Office; and THE GRAVETTE PUBLIC SCHOOL DISTRICT.

The Respondents before this Court are the Plaintiffs in the District Court and Appellees in the Circuit Court, JOHN DOE and MARY DOE, Individually and as Next Friends of the Minor, CHRIS DOE.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

LIST OF PARTIES.....iii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....2

CONSTITUTIONAL PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....4

REASONS FOR GRANTING THE WRIT.....18

CONCLUSION.....30

APPENDIX

TABLE OF AUTHORITIES

FEDERAL COURTS

Abington Township v. Schempp
374 U.S. 203, 10 L.Ed.2d 844,
83 S.Ct. 1560 (1963).....18, 19, 21

Employment Division v. Smith
494 U.S. ___, 108 L.Ed.2d 876.
110 S.Ct. ____ (1990).....28

Lemon v. Kurtzman
403 U.S. 602, 29 L.Ed.2d 745,
91 S.Ct. 2105 (1971).....5, 23, 24

McCollum v. Board of Education
333 U.S. 203, 92 L.Ed. 649,
68 S.Ct. 461 (1948).....24, 25, 26, 27

McGowan v. Maryland
336 U.S. 420, 6 L.Ed.2d 393,
81 S.Ct. 1101 (1961).....28

Zorach v. Clauson
343 U.S. 306, 96 L.Ed. 954,
72 S.Ct. 679.....25

CONSTITUTIONS AND STATUTES

U.S. Constitution, Amendment I....3, 5, 19,
21, 23, 27

U.S. Constitution, Amendment XIV.....3

28 U.S.C. Sec. 1254 Sec. (1).....2

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1990

PAUL DEE HUMAN, Superintendent of Gravette Public School District; A.P. VOHS, Principal of Gravette Elementary School; DALE BEQUETTE, President of the Gravette School Board; and JOHN GARRETT, REX ELDER, JERRY EASLEY, CHARLES L. CASEY, BILLY V. HALL, and BILL MEADE, Members of the Gravette School Board; and Their Agents, Employees, and Successors in Office; and THE GRAVETTE PUBLIC SCHOOL DISTRICT, Petitioners,

v.

JOHN DOE and MARY DOE, Individually and as Next Friends of the Minor, CHRIS DOE, and all others similarly situated, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, Superintendent Paul Dee Human and the Gravette, Arkansas, School Board, et. al., respectfully pray that a writ of certiorari issue to review the judgment, opinion and orders of the United States Court of Appeals for the Eighth Circuit dated October 23, 1990, affirming the Order and Opinion of the U.S. District Court for the Western District of Arkansas November 2, 1989.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Eighth Circuit dated October 23, 1990, is unreported; the Case Number is 89-2945. The Opinion and Order of the United States District Court for the Western District of Arkansas dated November 3, 1990, is reported at 725 F. Supp. 1503; the Case Number is 89-5088.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 Sec. (1).

The Order of the United States Court of Appeals for the Eighth Circuit was entered on October 23, 1990. This Petition has been filed within ninety days of the entry of judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

This case raises issues under the

Establishment Clause, Free Exercise Clause, and Free Speech Clause of the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The case also raises issues under the Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution, which provides:

> Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Procedural Posture

This case arises from the appeal of a permanent order issued against Petitioners prohibiting Petitioners, public school officals and board members, from allowing a nonsponsored, nonfunded, voluntary course of Bible instruction to take place on public school premises during regular school hours.

On July 12, 1989, Plaintiffs/ Respondents John Doe, Mary Doe, and Chris Doe filed a Complaint in the United States District Court for the Western District of Arkansas, Fayetteville Division, alleging that said course of Bible instruction violated their rights under the Establishment Clause and Free Exercise Clause of the First Amendment, and seeking an injunction prohibiting said course of Bible instruction from taking place on

school premises. On August 3, 1989, the District Court issued an Temporary Order prohibiting Defendants/Petitioners from permitting this course of Bible instruction or any similar course on school premises during regular school hours.

On August 10, 1989, Plaintiffs/ Respondents (Respondents) moved for partial summary judgment. On November 3, 1989, the District Court granted Respondents' Motion for Partial Summary Judgment and made the Temporary Order into a Permanent Order. Considering the three-prong test used by the Supreme Court for establishment clause cases as set forth in Lemon v. Kurtzman, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105 (1971), the District Court ruled that a substantial issue of material fact existed as to whether the course of Bible instruction had a secular purpose, but that the course clearly has the primary effect

of advancing religion and probably constitutes excessive entanglement of government with religion.

On November 30, 1989, Defendants/ Petitioners (Petitioners) appealed the Orders of August 3, 1989, and November 3, 1989, to the United States Court of Appeals for the Eighth Circuit. On October 23, 1990, the United States Court of Appeals for the Eighth Circuit affirmed the ruling of the District Court.

On January 18, 1990, Petitioners filed a Motion for Declaratory Judgment, asking the District Court to rule that the course of Bible instruction, as modified in several respects, did not violate the First Amendment to the United States Constitution. On February 14, 1990, the District Court denied Petitioners' Motion.

B. Statement of Facts

Gravette is a community of about 1,400 people, located in Benton County in the northwest corner of Arkansas. The Gravette School District includes the Town of Gravette and several nearby communities, as well as rural area. Gravette Elementary School has 532 students; about seventy percent (70%) ride the bus to school.

For at least fifty-one years, a weekly course of Bible instruction called Storytime has taken place in the Gravette Elementary School. The Storytime program consists of Bible story lessons of about half an hour in length, taught by ladies from the community. The ladies who teach the Storytime lessons are not state-certified teachers, are not hired by the school district, and receive no compensation for their teaching. The content of the teaching consists of

explaining to the children what the Bible says, and every effort is made to avoid teaching the doctrines of any particular denomination. The curriculum used is published by a nondenominational publishing house and spans the course of three years, two years being devoted to the Old Testament and one year to the New Testament. The two ladies who have conducted the Storytime sessions for the past several years, Elsie Smith and Barbara Stapleton, do not attend the same church.

The Gravette School Board has permitted Storytime to take place as a nonsponsored activity on a voluntary basis. Children are not allowed to attend Storytime unless their parents give written permission; however, about ninety-six percent (96%) of the parents do give written permission. Those whose parents do not give written permission for them to

attend Storytime are given other worthwhile things to do while Storytime takes place.

When it is time for Storytime, regular classes are released and those whose parents wish them to attend Storytime leave their regular classrooms and go to the classroom where Storytime takes place, while those who do not attend Storytime go elsewhere. These times are at regular class intervals while students generally are going to and from classrooms, so those who do not attend Storytime are not forced to leave the classroom while the others remain or remain in the classroom while the others leave.

Petitioners offered the following evidence by affidavit:

(1) Dr. Arnold Burron, Ph.D. Professor of Education at the University of Northern Colorado (a position he has held for twenty years), will testify that there

are hundreds of idioms in the English language and in common American usage that cannot be understood without a knowledge of the Bible. Among these are "he sold his birthrite for a mess of pottage," "city upon a hill," "salt of the earth," a "Judas Iscariot" for traitor, "It's David versus Goliath in tonight's football game," and hundreds of others. He will further testify that the Bible serves a secular purpose in educational development since it contains information that is valuable and foundational in many subjects such as law, government, history, literature, music, art, and others. He will further testify that a non-sponsored voluntary Bible study such as that which has taken place in Gravette, Arkansas, is not likely to involve undue peer pressure or stigmatization for those who do not participate. He will further testify that

that while the distinction between the school granting access to a Bible study and state sponsorship of the Bible study could probably be explained so that elementary school children could understand it, such explanation is unnecessary because elementary school-age children generally do not have a clear concept of what the state is, and thus the question of state sponsorship generally does not occur to them.

(2) Dr. Raymond Moore, Ph.D. in Educational Psychology, a former principal, superintendent, dean of a college of education, college president, and graduate programs officer for the U.S. Office of Education, will testify that the Bible plays a vital and foundational role in the development of children's values and morals, and that Bible study can be presented to children in a public

elementary school without peer pressure, without stigmatization, and without the appearance of state sponsorship, if it is handled properly.

(3) Dr. Dale R. Doty, Ph.D. in Family & Child Studies and Family Therapy from Oklahoma State University, will testify that the Bible can play an important role in children's character development and contains much that is helpful in training children to be good family members and, eventually, good parents.

(4) Dr. William B. Berman, Ph.D. in Educational Psychology from Indiana University, has been a public school psychologist and a supervisor of school psychology practicum, supervising graduate students in all areas of school psychological services. He will testify that teaching the Bible in public schools services a secular purpose, that of

fostering good character and moral values, and that of enhancing good order and discipline in the classroom.

(5) Dr. Glenn Carnagey, Ph.D. in American and English Literature, will testify that an understanding of the Bible is essential to an understanding of Western literature, particularly English and American literature, and also essential to an understanding of world history.

(6) Dr. W.R. Coulson, Ph.D. in Counseling Psychology and former research assistant to Drs. Carl R. Rogers and Abraham H. Mazlow, will testify that children need a sense of moral absolutes or moral commandments in the process of forming values, because children who are deprived of these moral absolutes lose all sense of moral development. He will testify that the Bible is a good sourcebook for such moral absolutes and moral

commandments, and that while it might be possible to use another source, it is most sensible and practical to use a source that is generally accepted by the community and reflects the moral values of the community. He will further testify that children of elementary school age are capable of distinguishing between school sponsorship and mere access to school facilities, especially if this distinction is carefully explained to them. He will further testify that much of public education follows the philosophy of John Dewey which calls for the systematic denial of the supernatural and seeks to bring the non-supernatural view into control of the machinery of education, and that courses of Bible instruction can be a balanced means of dealing with this problem.

(7) Dr. Paul Vitz, Professor of Psychology at New York University, will

testify that he conducted a federally-funded study of public school textbooks and concluded that the textbooks commonly used in the public schools of the United States do not give adequate, balanced, or objective treatment to the Bible, to Christianity, and particularly to Protestantism, and that textbooks do not give adequate or balance treatment to the role religion plays in the lives of the American people today. Because of this, the textbooks commonly used in the public schools of the United States are seriously deficient in the academic and moral development of children.

At the July 31, 1989, hearing on the Motion for Preliminary Injunction, Gayla Hendren, then a third-year law student at the University of Arkansas at Fayetteville, and now a Gravette attorney, testified that she was raised in Gravette, attended the

Gravette Elementary School, and participated in the Storytime program. She testified further that she was never pressured by the Storytime teachers to accept or believe any idea or doctrine, and that the Storytime program was enjoyable and helpful in her character development. She testified further that as an undergraduate music major she was better able to understand some of the great works of classical music because of her Bible training, and further that her Bible training helped her to cope with various ethical dilemmas during her law school training.

No evidence was presented indicating that the Storytime program had any effect of making students become more "religious" or converting them to any particular religion. Nor was any evidence presented indicating that any of those who

established the Storytime program, permit Storytime program to operate to day, or conduct the Storytime program, did so or do so with a primary religious purpose.

The ladies who currently teach Storytime testified that they make every effort to avoid denominational controversies and instead simply teach what the Bible says. They acknowledged that occasionally statements are made like "Jesus is the Son of God" or that the world was created in six days, but it is not clear from the record whether such statements were made as statements of objective fact, subjective opinions of the teacher, or simply saying that this is what the Bible says. The record is also unclear as to how frequently such statements were made, and no evidence was presented as to what if any effect such statements may have had upon the students.

REASONS FOR GRANTING THE WRIT

This case is unique, yet its application is universal. No case involving a course of Bible instruction of this nature has ever come before the United States Supreme Court, but the troubling question of whether or how to teach the Bible in our diverse society, faces every public school in the nation.

This Court has recognized that the Bible definitely has a place in public education. Even while striking down the reading of ten verses of the Bible daily as an official classroom exercise of worship, the Court emphasized that they did not mean to exclude the Bible from public education. Justice Clark, speaking for the majority in Abington Township v. Schempp, 374 U.S. 203, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963), wrote:

> ...it might well be said that one's education is not complete without a

> study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

Nevertheless, the precise role of the Bible in the public school classroom is difficult to assess because of constitutional constraints. Several of the leading religions, including Judaism and Christianity, are based upon the Bible.

Fearing entanglement of religion with the state, some educators have tried to avoid the problem by not mentioning the Bible at all in public schools. But by doing so they leave a large gap in their students' knowledge, and they deprive their students of a rich resource.

To a large extent, education is the

passing on of culture from one generation to the next. Every culture is ultimately based upon values, and values in turn have their roots in religion.

In the United States today, the state (meaning government, federal, state and local) carries the primary responsibility for promoting and passing on culture. It does so through its public schools, universities, endowments, and other means. If the state is the nation's chief educator, and if education involves culture, and if culture involves values, and if values are based upon religion, then inevitably, government must be involved with religion. For this reason the absolute separationist model of church-state relations, advocated by some but never adopted by this Court, is utterly unworkable. It was probably unworkable when this nation was founded. It is even

more unworkable today. In an age such as ours in which government at all levels is so intimately involved with the lives of the American people, it is impossible to totally separate government from religion. Attempts to do so are likely lead to the establishment of a semi-official "religion of secularism" in the sense of "affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe,'" which, as the Supreme Court noted in Abington v. Schempp, supra, the State may not do.

The Gravette case provides this Court with an excellent and unprecedented opportunity to review and reassess the Establishment Clause of the First Amendment, both as intended by the Framers of the Bill of Rights and as applied to our public schools today. For the people have

Gravette have chosen a unique and promising way of coping with the thorny question of whether and how to teach the Bible in public schools. Rather than ignore the Bible and deprive the children of an important educational resource as some have done, and rather than water it down through official courses in "Bible as literature" or "comparative religion" as others have done, the people of Gravette have chosen to separate Bible study from the regular curriculum and instead allow it to be taught by non-school persons as a non-sponsored, non-funded, voluntary activity. We suggest that this freedom from school sponsorship gives those who participate in Storytime greater freedom to conduct the program as they see fit, than they would have if Storytime were an official part of the curriculum.

We do not necessarily suggest that the

Court needs to abandon the three-prong test of Lemon v. Kurtzman, supra., for evaluating establishment clause cases, in order to uphold the Storytime program as constitutional. Rather, we believe the Storytime program can pass the "Lemon" test with flying colors:

(1) Storytime clearly has a secular purpose: developing character, training in moral values, and helping students understand a Book that has exerted an enormous influence on Western literature, art, music, law, philsophy, government, history, and life in general. The District Court in its November 3, 1989 Opinion acknowledged that a genuine issue of material fact exists as to the existence of a secular purpose.

(2) The primary effect of the Storytime program is to achieve the secular purposes stated above. Not a shred of

evidence exists to establish that the program has had any effect of advancing or inhibiting religion, let alone a primary effect. If such a primary effect exists, Respondents should bear the burden of proving this primary effect.

(3) There is no excessive entanglement. The school's role is limited to providing the room, distributing and collecting permission slips from parents once a year, and releasing the children to go to Storytime. The school does not select the curriculum, choose the teachers, dictate the teaching methods, monitor the classes, fund the program in any way, or either encourage or discourge attendance. It is hard to imagine how any activity could be less "entangled" than that.

Nor do we suggest that the Court needs to abandon its holdings in McCollum v. Board of Education, 333 U.S. 203, 92 L.Ed.

649, 68 S.Ct. 461 (1948), or Zorach v. Clausen, 343 U.S. 306, 96 L.Ed. 954, 72 S.Ct. 679 (1952). In McCollum the Court struck down an Illinois practice of allowing children to be released from their classes to attend religious instruction offered by pastors, priests and rabbis in assigned classrooms in the public schools, whereas in Zorach the Court upheld a New York program whereby children were released from classes to attend religious instruction off-campus in the children's respective churches.

At first glance the Gravette program might seem more like McCollum, since the program takes place on campus; but we believe substantial differences exist.

(1) In McCollum the religious studies were conducted by various denominations, while in Gravette there is one nondenominational study. The reason no

other program exists is that no one has ever asked to have one; the Board has stated that if any such request were received, it would be handled on an equal access basis.

(2) In McCollum the released time classes were sponsored by specific churches and synagogues and taught by ordained ministers, priests and rabbis, whereas in Gravette the Storytime program is not sponsored by any church and is taught by two laypersons who do not even attend the same church.

(3) In McCollum the complainants alleged that subtle pressures were exerted to compel attendance; in Gravette no such pressures are proven or even suggested, and the way the program is structured eliminates or minimizes that possibility.

(4) Most importantly, in McCollum the classes dealt with specific denominational

church doctrines; in Gravette the study is nondenominational and the teachers simply present the content of the Bible and make every effort to avoid denominational doctrines. This is highly significant because it means (a) the secular purpose of the program is greater, (b) there is less effect of advancing religion, and (c) there is less entanglement of government with religion.

For this reason, the Gravette case gives the Court an opportunity to consider the meaning of the term "religion" as used in the First Amendment. The term can have several connotations. On the one hand, the term can refer to a specific denomination or specific set of doctrinal beliefs unique to a denomination. On the other hand, the term can be used for a value system or set of moral principles that have their roots in religious beliefs. For example, there

are certain morals, values, or ethical principles that are found in the Bible and that are adhered to by, among others, Christians and Jews. Petitioners respectfully suggest that schools, as state agencies, have or should have more freedom to interact with "religion" in this second sense than in the first sense, and that this interpretation is consistent with the First Amendment as intended by its Framers and as it should be applied today. We believe this is consistent with the concept of accommodating religion as set forth by this Court in McGowan v. Maryland, 336 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961), and being "solicitous" of religion as suggested by this Court in Employment Division v. Smith, 494 U.S. ___, 108 L.Ed. 2d 876, 110 S.Ct. ____ (1990).

We note, finally, that Petitioners have never had the opportunity to litigate

thes momentous issues in a full trial on the merits. Rather, the District Court decided the matter against Petitioners by means of summary judgment.

Summary judgment is clearly inappropriate where, as here, there are genuine issues of material fact. Many such issues of material fact exist, such as whether the Storytime program has a secular purpose, whether the Storytime program has the primary effect of advancing religion, whether the Storytime program involves excessive entanglement of government with religion, whether the content of the Storytime program is primarily secular or religious, whether the Storytime teachers express religious convictions, and if so, how often, to what extent, and with what effect upon the students.

CONCLUSION

We therefore respectfully request that the United States Supreme Court either reverse the decision of the United States Court of Appeals for the Eighth Circuit and rule that the Storytime program as practiced in Gravette, Arkansas, is constitutional, or remand the case to the United States District Court for the Western District of Arkansas for a full trial on the merits.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

JOHN DOE and MARY DOE, Individually and as Next Friends of the Minor, CHRIS DOE, and all others similarly situated — PLAINTIFFS

v. Civil No. 89-5088

PAUL DEE HUMAN, Superintendent of Gravette Public School District; A.P. VOHS, Prilncipal of Gravette Elementary School; DALE BEQUETTE, President of the Gravette School Board; and JOHN GARRETT, REX ELDER, JERRY EASLEY, CHARLES L. CASEY, BILLY V. HALL, and BILL MEADE, Members of the Gravette School Board; and Their Agents, Employees, and Successors in Office; and THE GRAVETTE PUBLIC SCHOOL DISTRICT — DEFENDANTS

ORDER

This matter having come on for hearing on the Plaintiff's Motion for a Preliminary Injunction, and the court being informed in the premises, the court finds:

1. That the Plaintiffs have demonstrated the existence of a substantial question upon which

they are likely to prevail upon final hearing, that question being whether the Gravette Public School District and the individual Defendants, by encouraging or permitting Bible instruction on the premises of the Gravette Elementary School during scheduled attendance hours, has established a religion in violation of the United States Constitution.

2. That the alleged constitutional violation exposes the Plaintiffs to immediate and irreparable harm.

3. That the balance of harms between the parties favors the Plaintiffs.

4. That the general public interest favors granting the injunction.

THEREFORE, IT IS ORDERED, that the Defendants, and each of them, be immediately enjoined, pending further

proceedings herein, from permitting on school premises within scheduled school hours, the existing course of Bible instruction or any other instruction that is predominantly religious in its purpose or effect; and from sponsoring by the authority of the Gravette Public School District any similar course ofinstruction that has a predominantly religious purpose or effect. This injunction is to be effective immediately and until further order of the Court.

It is so ordered.

-s-

HON. MORRIS S. ARNOLD
UNITED STATES DISTRICT JUDGE

Filed August 3, 1989

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
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ORDER

NOW on this 2 day of November, 1989, comes on for consideration plaintiffs' Motion for Partial Summary Judgment, filed on August 14, 1989, inthe above-styled cause. Defendants filed a response on September 8, 1989, and both sides have filed reply briefs.

For the reasons stated in the accompanying Memorandum Opinion, it is ORDERED that plaintiffs' motion be, and it is hereby, granted.

-s-

HON. MORRIS S. ARNOLD
UNITED STATES DISTRICT JUDGE

Filed Nov 3, 1989

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
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MEMORANDUM OPINION

For longer than anyone can reliably remember, perhaps for as long as 51 years, the Gravette, Arkansas public schools have provided an opportunity for its elementary school children to learn about the Bible. Bible classes are taught during regular school hours and in the school building, by

volunteers who are not acting on behalf of any church and re not employees of the school. No course credit is given for these classes and attendance is voluntary. Parents who do not wish their children to attend can arrange for them to spend the time given over to Bible classes int he library, in tutoring sessions, or in other, unspecified, instructional situations. Ninety-six percent of the children attend the Bible class.

The parents of one of the affected chldren filed this sulit under 28 U.S.C. sec. 1983, asserting that the practice described above violates the Establishment and Free Exercise Clauses of the First Amendment of the Constitution of the United States, and in their complaint plaintiffs moved for a preliminary injunction. A hearing was held and a week later, this court filed an order granting the

preliminary injunctin. A few days later, plaintiffs filed the instant motion for partial summary judgment as to their Establishment Clause claim. Plaintiffs assert that the case of McCollum v. Board of Education, 333 U.S. 203 (1948), is directly on point, and that under the holding of Lemon v. Kurtzman, 403 U.S. 602 (1971), defendants' practices are unconstitutional. Defendants, on the other hand, argue that McCollum is distinguishable from this case, that defendants' practices are constitutional under Lemon, that the "equal access" doctrine of Widmar v. Vincent, 454 U.S. 263 (1981), allowes privately conducted Bible study programs, that other factual disputes preclude summary judgment, and that miscellaneous other issues preclude summary judgment. For the reasons stated below, plaintiffs' motion will be granted.

I.

In McCollum v. Board of Education, supra, a school system created a program in which Protestant, Catholic, and Jewish instructors came into public schools and held classes during school hours. Although the program was purely voluntary, the Court held that the program unconstitutionally aided religion, because "[p]upils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend religious classes." Id. at 210.

Defendants in McCollum, like defendants in this case, argued that "historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions." Id. at 211. The Court explicitly rejected this argument, id.

reiterating its earlier holding that governments may not "pass laws which aid one religion, aid all religions, or prefer one religion over another." Id. at 210, quoting Everson v. Board of Education, 330 U.S. 1, 15 (1947).

Defendants argue that McCollum is distinguishable from this case for numerous reasons. They assert first that in McCollum "the religious instruction was provided by specific religious bodies, whereas in Gravette the Bible instruction is nondenominational." In fact, the Gravette Bible study classes are clearly Christian, and therefore sectarian in nature. See County of Allegheny v. American Civil Liberties Union, 57 U.S.L.W. 5045, 5053 (U.S. July 3, 1989) (although "[t]he history of this nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed

Christianity specifically ... this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause").

Second, defendants argue that McCollum is distinguishable from this case because the religious instruction is provided by lay people rather than "official representatives of specific denominations...." The court fails to see the relevance of this fact. If defendants have established Christianity as a state religion, it is irrelevant whether they have done so through officials of a church or through Christian lay people unconnected with any denomination. A related argument is that in the Gravette program, unlike that invalidated in McCollum, no group sponsors the instruction. The court is of the view that the absence of sponsorship is

not a particularly important factor, and would not validate an otherwise unconstitutional program.

Defendants also note that "[i]n McCollum the religious leaders conducting the instruction took attendance and reported absences to the school officials; in Gravette they do not." This argument relates primarily to the voluntariness of the Bible instruction program, a factor the McCollum court explicitly refused to consider. McCollum, 333 U.S. at 207 n.1 (Court finds it unnecessary to consider claim that due to peer pressure, program "voluntary in name only"). To the extent that this factor relates to the question of church/state entanglement, the court holds that it was not important to the decision in McCollum.

Defendants point out, additionally, that in McCollum the students who did not

participate in religious studies had to leave the room, while in Gravette the participants leave the room. This fact is relevant primarily to the voluntariness of defendants' program, a question which was irrelevant to the holding in McCollum.

Finally, defendants argue that a genuine issue of material fact exists as to whether the Bible study program is "primarily religious in character ..."(DB 4) and that the "question of the meaning of religion and faith ... needs amore complete hearing."(DB 13) By contrast, in McCollum defendants made no pretense that their classes were secular in nature. In its initial opinion, the court held that "it would be difficult, indeed impossible, not to categorize the instructional program undertaken here as a religious one." (MO 4). On the other hand, it is clear that a valid secular purpose exists for teaching

the Bible. The court will discuss this question in greater detail below, in its discussion of Lemon.

In sum, the court finds that McCollum is on point. The court will therefore grant summary judgment unless it finds below that McCollum has been modified by Lemon or Widmar,(1) or that a genuine isue of material fact exists as to whether defendants' program is primarily religious in nature.

II.

Under Lemon, any government

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(1)The court notes in passing that McCollum is still good law. In the Supreme Court's most reent Establishment Clause opinion, it cited McCollum for the proposition that a state may not "allow public-school students to receive religious instruction on public-school premises." County of Allegheny, 57 U.S.L.W. at 5049 n. 40 (dictum). It follows from this that any program unconstitutional under McCollum probably violates Lemon as well and that defendants' program is unconstitutional if it constitutes "religious instruction."

involvement with religion, to be constitutional, must have a secular purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion. Lemon, 403 U.S. at 612-13. The Court has made it explicit that "[s]tate action violates the Establishment Clause if it fails to satisfy any of these" requirements. Edwards v. Aguillard, 482 U.S. 578, 583 (1987).

A.

Although Mrs. Smith, one of the Bible teachers at Gravette schools, is clearly a devout Christian, she also "believes the Bible is of great value" in helping children to develop sound moral values and to understand and appreciate the culture in which we live, since that culture has been largely shaped by the Bible." (Smith

Affid., para. 4). Under the circumstances, on the present state of the record, the court finds that there is a genuine issue of material fact as to whether the primary purpose of Gravette's program is religious or secular.

B.

Even if defendants' program has a primarily secular purpose,it is still unconstitutional if the principal effect of the course is either to advance or inhibit religion. The Gravette Bible classes are plainly not wholly secular in characer. Nevertheless, defendants argue that even if the Bible study program has religious elements, its primary effects are the secular ones of "building character, forming moral values, and developing a truly educated person."

Even on the relatively undeveloped state of the record before the court, it is

quite clear that the course in question is predominantly religious and devotional in nature. Many of the songs taught in the course are religious, although some contain moral messages as well. For instance, the song "Countdown" discusses Jesus's Second Coming to Earth (plaintiffs' Exhibit 13), the song "My B-I-B-L-E" (plaintiffs' Exhibit 16), is self-explanatory, and "This Old Saint" unapologetically states Christian dogma (plailntiffs' Exh. 2). The song "L.O.V.E." speaks of Jesus's love for mankind, exemplified by his crucifixion (plaintiffs' Exh. 14). Even if nothing else was taught, these songs alone would render defendants' program constitutionally infirm. But there is more. In classroom discussion, Barbara Stapleton, one of the teachers, emphasized that "Jesus is our gateway to Heaven. He is our shepherd and he wants us all to be one big flock of

sheep." (Plaintiffs' Exh. 16). These teachings would seem to have no secular effect whatsoever. The other major "non-song" exhibit, "The Bible In Felt" is quite religious in nature, as it depicts Biblical events without elaboration. (Plaintiffs' Exhibit 1). In sum, the evidence in the record shows quite clearly that many of the songs and parables taught in the class endorse Christianity, and have very little, if any, secular effect.

It may be that other lessons have more secular content than those discussed above. For instances, the song "Work on Your Attitudes" (Plaintiffs' Exh. 15) is predominantly secular, and Gayla Hendren testified at the injunction hearing that she derived moral and historical benefits from the classes (DRB 10). Even if a substantial portion of defendants' program was predominantly secular, the court would

find that the program as a whole was unconstitutional, for the reasons stated in Abington School District v. Schempp, 374 U.S. 203, 225 (1963):

> "Further, it is no defense to urge that the religious practices here may be relatively minor encroachments upno the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent; and in the words of Madison, 'It is proper to take alarm at the first experiment of our liberties.' ..."

Defendants further argue that even if the Bible course as presently constituted is unconstitutional, certain modifications could cure its legal infirmities. This court has repeatedly said that it has no inclination whatever to issue advisory opinions or to take over the Gravette Public School District, and it therefore declines defendants' invitation to outline a constitutionally permissible form of Bible instruction. The court acknowledges that several courts have indeed formulated

alternative policies in cases like this, but declines to adopt their approach. If defendants implement alternative policies, the court may judge their constitutionality at that time if requested to do so by the plaintiffs.

C.

Because defendants' program unconstitutionally advances religion, the court need not discuss the question of excessive entanglement in great detail. In the court's view, if an evidently religious study course is taught on school grounds during regular school hours, the school is excessively entangled in it regardless of who teaches such classes. If the classes were taught after school, and if the school board allowed other activities to take place on the premises after school, then it might well violate the free exercise clause not to allow religious instruction on the

premises. More than this need not be said on this subject at this time.

III.

Defendants also argue that the concept of "equal access" enunciated in Widmar v. Vincent applies to this case. Under Widmar, a school may not create "a forum generally open to student groups ... [but] enforce a content-based exclusion of religious speech." Widmar, 454 U.S. 277. See also Mergens v. Board of Education of Westside Community Schools, 867 F.2d 1076 (8th Cir.), cert. granted, 57 U.S.L.W. 3859 (U.S. July 3, 1989) (under Equal Access Act codifying Widmar and extending doctrine to secondary schools, school which allows any "noncurriculum-related student club" must also allow religious clubs).

The court notes initially that the idea of a limited forum is much more at home in the context of colleges and

universities, where students operate as semi-autonomous citizens infrequently trammelled by persons acting in loco parentis. University classes, moreover, do not meet continuously nor is attendance for a certain number of hours a day required by law as is the case with Arkansas elementary schools. See A.C.A. sec. 6-16-102. In such an environment, it is easier to characterize the activity of a school with respect to religious exercises as mere permission and not active participation. In elementary schools, however, teachers and administrators are not charged with the duty to supervise their students constantly and to tend to their moral development. In the case of elementary schools, therefore, the notion of a limited forum is not one easily resorted to in order to save an activity from a claim of excessive entanglement. It may just be that it is

not impossible for an elementary school to establish a forum from which it would be unconstitutional to religious activities. But in this case, where no equal access policy existed before this lawsuit was filed, and where thereis no history whatever of other extracurricular activities being allowed a place in the school day, permitting the present practice to continue would involve the school board in an excessive entanglement with religion. The court recognizes the question as a close one, but, on balance, this seems the correct result, especially when the McCollum case provides a kind of bright-line test for cases of this sort.

IV.

Finally, defendants argue that genuine issues of material fact exist as to the following issues: (1) whether the Bible has a secular educational value; (2)

whether the Bible instruction program has a secular purpose, and if so, whether it has an "overriding religious purpose which nullifies the secular purpose" (DB 5); (3) the extent of the school district's "entanglement" with the Bible classes (DB 5); (4) whether the program impermissibly advances religion; (5) whether the program "creates the impression ... that the state is endorsing or sponsoring religion." (DB 5); (6) whether the program as presently structured "creates undue peer pressure to participate...." (DB 5); (7) whether the program is in fact "primarily religious in character...." (DB 4); and (8) whether, if the program is unconstitutional as presently structured, it could be made constitutional by modifications.

All but the first and sixth of these contentions have been addressed above, and both of these contentions are irrelevant to

the outcome of this case. Questions of peer pressure and voluntariness are primarily relevant to plaintiffs' Free Exercise claim rather than their Establishment Clause claim, and the educational value of the Bible is not in dispute. Accordingly, the court finds that no genuine issue exists as to any material fact.

V.

In an addendum to their brief filed on September 12, 1989, defendants raise certain arguments not raised in their original brief.

First, defendants argue that the total exclusion of the Bible from public schools would violate freedom of speech and religion, as well as the right of Gravette parents to educate their children. Indeed, it is well settled that Bible study, "when presented objectively as part of a secular program of education, may ... be effected

consistently with the First Amendment." School District of Abington Twp., Pennsylvania v. Schempp, 374 U.S. 203, 225 (1963). Entry of summary judgment in this case, however, would not require total exclusion of the Bible, but would merely enjoin a specific program. Thus, defendants' argument is beside the point.(2)

Defendants also argue that entry of an injunction in this case would violate Elsie Smith's right to freedom of speech. Mrs. Smith certainly has the right to discuss religion, but she has no right to teach a religious course during school hours on public school grounds.

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(2)Similarly, defendants argue that their classes "balance" secular humanism in public school textbooks (DRB 12). Even if defendants have established one religion (secular humanism), such conduct does not allow them to establish a second (Christianity).

Finally, defendants claim without elaboration that Zorach v. Clauson, 343 U.S. (1952) is on point. In Zorach, the Court upheld a program where students were released from public schools so they could receive religious instruction at other locations. As the religious instruction in Zorach took place off campus, that case is not on point. Defendants argue that off-campus instruction is impossible in a rural district, and that an on-campus program is therefore permissible under Zorach. The court fails to see, however, how Zorach can be both applicable and inapplicable at the same time. Furthermore, defendants' broad interpretation of Zorach would require this court to ignore McCollum, because the major difference between the two cases is that the McCollum instruction was on-campus and the Zorach instruction was off-campus.

Accordingly, the court will grant partial summary judgment and make its preliminary injunction permanent.

November 2, 1989 -s-

Date

HON. MORRIS S.ARNOLD
UNITED STATES DISTRICT JUDGE

Filed November 3, 1989

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

JOHN DOE, et al. PLAINTIFFS

v. Civil No. 89-5088

PAUL DEE HUMAN, et al. DEFENDANTS

ORDER

NOW on this 13 day of February, 1990, comes on for consideration defendant's Motion for Declaratory Judgment, filed on January 18, 1990. And plaintiffs filed a response on January 30, 1990.

On November 3, 1989, this court issued a permanent injunction barring Bible instruction in the Gravette, Arkansas, public schools. Doe v. Human, 725 F. Supp. 1503 (W.D. Ark. 1989). Defendants plan to alter the Bible classes to meet the court's objections, and seek a declaratory judgment that the revised classes are constitutional. The court will deny defendants' motion, because: (1) federal

courts generally may not entertatain suits seeking a declaratory judgment that state law is constitutional, and (2) defendants' new policy does not yet present a justiciable controversy.

I.

As a general rule, "[f]ederal courts have no jurisdiction of a declaratory judgment suit seeking a declaration that a state law is constitutional." 22A Am. Jur. 2d, Declaratory Judgment, Sec. 197 at 837 (1988). See also International Society for Krishna Consciousness v. City of Los Angeles, 611 F.Supp. 315 (C.D. Cal. 1984) (city could not sue for declaration that resolution restricting airport solicitation was constitutional); cf. Franchise Tax Board v. Construction Laborers Trust, 463 U.S. 1, 21 (1983) (no federal jurisdiction where state tax board sued both for enforcement of state tax laws and for

declaratory judgment that state laws were not preempted by ERISA).

It could be argued, however, that International Society and Franchise Tax Board are distinguishable, because the rationales supporting those decisions are not applicable to this case.

The International Society court held that if the government filed an affirmative suit to enforce the challenged ordinance, the suit would be under the ordinance itself rather than under federal law. Thus, the government lacked an indpendent federal cause of action. International Society, 611 F.Supp. at 317-18. By contrast, in this case defendants could not possibly sue plaintiffs to enforce their new Bible policy, and therefore have no cause of action under state law. It could therefore have no cause of action under state law. It could therefore be argued

that International Society is inapplicable because the only possible suit by defendants would be one under federal law. If the court adopted this view, it would be holding that local governments could sue for a declaratory judgment in federal court if, and only if, they could not sue under state law. As such an outcome is obviously absurd, the court finds that the rule of International Society should be applied to this case.

In Franchise Tax Board, the Supreme Court barred a state government's declaratory judgment action because states "are not significantly prejudiced by an inability to come to federal court for a declaratory judgment in advance of a possible injunctive suit by [a private plaintiff]...." Franchise Tax Board, 463 U.S. at 21. It could be argued that Franchise Tax Board is inapplicable to this

case, because the government risks a contempt citation by waiting for private plaintiffs to sue. Even if defendants were found in contempt of the court's November 3 order, defendants could minimize any resulting prejudice through prompt compliance with the order. The court therefore finds that Franchise Tax Board bars declaratory judgment actions by governments even where, as here, the court has already addressed the constitutionality of similar government conduct.

In sum, the court finds that the differences between this case and the cases cited above do not bar application of the general rule that state and local governmentsmay not seek a declaratory judgment from a federal court that their practices area constitutional. On this basis alone, defendants' motion should be denied.

II.

Even if this court could entertain a declaratory judgment action in this case, it could be argued that there is not yet a justiciable controversy as to defendants' new policy. The difference between an abstract question of law and a justiciable controversy is a question of degree, 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure: Civil 2d sec. 2757 at 579-80 (2nd ed. 1983), and the decisionto allow or dismiss a declaratory judgment action is discretionary. The court finds that no substantial controversy presently exists in this case, for three reasons.

First, it is not yet clear whether there is any disagreement between the parties. Plaintiffs have not yet claimed that defendants' new policy is unconstitutional, and may never do so.

Second, the court cannot yet determine whether or how defendants' new policy differs from their earlier policy. The major difference between defendants' "new" Bible classes and their "old" classes, according to defendants, is that the teachers "will refrain from expressing opinions as to the truth or falsity of the Bible ... and will refrain from using songs that teach doctrinal content...." (Motion for Declaratory Judgment, para. 4). Before this court entered summary judgment, defendants made identical claims as to their earlier policy. For instance, Elsie Smith, one of the Bible instructors, claimed that her classeswere non-denominational and that she did not express her personal opinions as to the truth or falsity of the Bible (First Smith Aff., paras. 3, 6). Thus, there is simply no way for the court to determine the

constitutionality of defendants' new policy before it is implemented.

Third, a declaratory judgment is inappropriate where "[t]he proposed decree cannot end the controversy." Public Service Commission v. Wycoff Co., 344 U.S. 237, 247 (1952). If, this court rejects defendants' new policy on the merits, defendants would probably draft another slightly different Bible instruction policy and request yet another declaratory judgment, and would repeat the process until the court finally ruled for the defendants. Thus, addressingdefendants' motion on the merits would not terminate liltigation, and would probably force this court into becoming a school board.(1) This court has repeatedly told defendants that it will not do that.

Accordingly, it is ORDERED that defendants' motion be, and it his hereby,

Feb. 13, 1990 -s-

Date HON. MORRIS S. ARNOLD
UNITED STATES DISTRICT JUDGE

Filed Feb. 14, 1990

(1)Plaintiffs also argue that this court was divested of jurisdiction to consider defendants' motion because this case is on appeal. A notice of appeal generally deprives the district court of jurisdiction over "those aspects of the case involvedinthe appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982). As defendants motion for declaratory judgment is ostensibly an entirely new cause of action, it is not affected by the notice of appeal.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2945

John Doe; Mary Doe, individually and as next friends of the minor; Chris Doe and all others similarly situated,	*	
Appellees,	*	
vs.	*	Appeal from the United States District Court for the Western District of Arkansas.
Paul Dee Human, Superintendent of Gravette Public School District; A.P. Vohs, Principal of Gravette Elementary School; Dale Bequette, President of the Gravette School Board; John Garrett; Rex Elder; Jerry Easley; Charles L. Casey; Billy V. Hall; Bill Meade, Members of the Gravette School Board and their agents, employees & successors in office; The Gravette Public School District,	*	[UNPUBLISHED]
Appellants.	*	

Submitted: October 8, 1990

Filed: October 23, 1990

Before LAY, Chief Judge, BRIGHT, Senior Circuit Judge, and TIMBERS,* Senior Circuit Judge.

PER CURIAM.

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*The HONORABLE WILLIAM H. TIMBERS, Senior Circuit Judge, United States Court of Appeals for the Second Circuit, sitting by designation.

Thecourt having reviewed the recordsand briefs in the above entitledcase orders that the case be affirmed on the basis of the well-reasoned opinion of the district court at 725 F. Supp. 1503 (W.D. Ark. 1989).

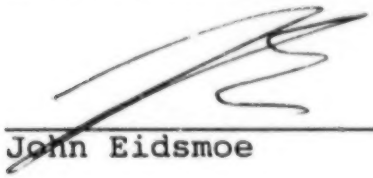
A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUT.

CERTIFICATE OF SERVICE

I, John Eidsmoe, do hereby certify that a true and correct copy of the foregoing was mailed this 22nd day of January 1991 to James Lingle and George Oleson, Attorneys at Law, P.O. Box 652, Rogers, Arkansas 72756.



John Eidsmoe